

KETUA PENGARAH HASIL DALAM NEGERI
v. SELECTCOOL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[CIVIL APPEAL NO: WA-14-44-09-2020]
13 FEBRUARY 2023

Abstract – (i) *A piece of land that has undergone alterations to make it more saleable, which has been acquired by a dormant company which existed for the purpose to keep and dispose of the land, clearly shows a motive to seek profit rather than for investment. Although the company had classified the said land as an asset and not as a stock in trade but based on the nature and character of the whole scheme of acquisition of the land, the Director General of Inland Revenue ('DGIR') is correct in taxing the company. The gains received by the company from the disposal of the land was indeed made with an intention to trade; and (ii) When the DGIR is made aware that the tax returns made by the company is undercharged resulting in less tax imposed on it, the DGIR has the right to impose a penalty under s. 113(2) of the Income Tax Act 1967.*

REVENUE LAW: *Income tax – Assessment – Notice of additional assessment – Appeal against – Disposal of land – Whether gains/profits arising from disposal of land taxable under s. 4(a) of Income Tax Act 1967 – Whether company ought to be imposed with penalty under s. 113(2) of Income Tax Act 1967*

This was an appeal by the appellant against the deciding order of the Special Commissioners of Income Tax ('SCIT') according to para. 34 of Sch. 5 of the Income Tax Act 1967 ('ITA') in respect of the notice of additional assessment for the year of assessment ('YA') 2013. On 20 August 1997, the Majlis Mesyuarat Kerajaan Negeri Sembilan had approved the application of the respondent company ('respondent') to acquire a plot of land ('land'). The respondent acquired the property from the Government of Negeri Sembilan with a purchase price of RM600,000 and intended to keep the property as a fixed asset of the company. The respondent never carried out any business under the company 'Selectcool Sdn Bhd' from 1996 to 2011. According to the respondent, the land was acquired with the sole intention of keeping it as a long-term investment as evidenced from the respondent's treatment in the audited accounts to classify the land as its fixed assets since the date of acquisition and this treatment had been consistently adopted throughout the period of its ownership of the land. The gain from the subsequent disposal of the land was captured as 'gain from disposal of fixed assets' and not of the respondent's revenue. In 2011, Nada Network Sdn Bhd ('Nada Network')

- A offered to the respondent to purchase part of the land with the condition that the respondent would subdivide the property. Both parties entered into a sale and purchase agreement and Nada Network agreed to the purchase price as set out by the respondent, which was RM2,003,080. In furtherance to the above, Nada Network had clearly stated its intention to ask the respondent
- B to subdivide the property to develop a service centre/petrol pump station. In relation to that, the respondent had made an application for planning permission to the Seremban Municipal Council and the application was approved by the authorities. The respondent was again approached with another offer by Condolink Sdn Bhd ('Condolink') to purchase the remaining
- C portion of the land. The respondent set a sale price at RM5,000,000 and both parties signed a sale and purchase agreement. In this sale and purchase transaction, Condolink was only able to pay the respondent in cash of RM2,600,000 and the remaining purchase amount of RM2,400,000 was settled in kind of eight units of shophouses in Port Dickson. Upon completion of the sale and purchase transactions, the respondent filed CKHT
- D Forms 1A, 1B and 3 to the Jabatan Perolehan dan Aset (Seremban Branch) of the appellant. Following that, the respondent also instructed an audit firm to prepare the financial statement report for the year 2013. The appellant raised the additional assessment for the YA 2013 in relation to the disposal of the land amounting to RM2,162,576.11. The respondent thereafter filed
- E their appeal against the notice of additional assessment by way of Form Q. The SCIT, in its deciding order, partially allowed the appeal by the respondent. Hence, this appeal by the appellant. The issues that arose were: (i) whether the gains/profits arising from the disposal of the land were taxable under s. 4(a) of the ITA; and (ii) whether the SCIT was right in law
- F and in fact to set aside the penalty under s. 113(2) of the ITA imposed by the appellant onto the respondent.

Held (allowing appeal):

- (1) Evidence produced before the SCIT clearly showed that the transaction by the respondent was evidence in the nature of trade based on: (i) the subject matter of the transaction was a plot of land; (ii) the respondent had the intention to gain profit from the disposal of the land; (iii) alterations had been made to the land before its disposal to make it more saleable such as the division of the lot from the land and application for planning permission; (iv) frequency of disposal made by
- G the respondent; (v) the location of the land; and (vi) the respondent's financial position. The SCIT failed to consider the facts that the land did not yield an income to the respondent since the acquisition of the land in 1997 until its disposal to Nada Network and Condolink in 2011 and 2012 respectively. The SCIT had also failed to take into account the
- H facts adduced from the reports and financial statements of the respondent whereby the respondent did not report any income for the year ended 30 June 2013 and the fact that the respondent was a dormant company.
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The fact that the respondent did not truly intend to yield income from the above investments showed that the respondent was trading when disposing of the said land. (paras 30, 31, 33 & 34)

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- (2) The intention of the respondent was not for investment but an adventure in the nature of trade as there was clear evidence showing a motive to seek profit rather than for investment, which could be seen from the evidence adduced in relation to the position of the respondent's company with only a capital of RM2 and its dormant status, both of which were a combination that showed the respondent was merely a shell of a company, which existed for the purpose to keep and dispose of the land in order to gain profit. Although the respondent had classified the said land as an asset and not as a stock in trade but based on the nature and character of the whole scheme of acquisition of the land, the appellant was right in their tax treatment of the respondent. (paras 44, 45 & 49)

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- (3) The SCIT had failed to take into account the fact that material alterations or improvements had been made to the land acquired or that its character or quality had been changed to render it more merchantable would tend to indicate that the land was derived from a profit-making undertaking or scheme. The respondent's action in hiring engineering consultants to do the alterations on the land was evidence of the respondent's intention to gain profit from the disposal of the land. The respondent did not refute the fact that the effects of the alteration done was that it would increase the commercial value of the land. As for frequency of transaction, one isolated transaction was enough to constitute trading. These two disposals were the transactions made for the purpose of trading to gain profits. (paras 51, 52 & 54-56)

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- (4) At the time of the acquisition of the land, the respondent had the intention to trade and to gain profit from the disposal of the land at the appropriate time. The respondent did not conduct any business activities knowing well that the price of the land would increase in time due to its location, position and category for the usage of the land. Also, the respondent's action in borrowing money from the director and/or shareholders (free from interest and the money could be returned when the respondent had sufficient funds to operate) for the purpose of acquisition of the land from the State Government of Negeri Sembilan supported the fact and argument that the motive and intention of the respondent when acquiring the land was to resell it at a profit. The SCIT had made a conclusion inconsistent with the primary facts and had failed to take into consideration all surrounding circumstance in arriving at its conclusion and opinion. (paras 62-65)

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- A (5) Had it not been for the findings from the audit exercise conducted by the appellant, the appellant would not be made known and aware that the tax return made by the respondent was undercharged resulting to less tax imposed on the respondent. The appellant had a right to impose a penalty under s. 113(2) of the ITA, which was equal to the amount of tax that had been undercharged. However, after taking into account the merits of the case, the penalty imposed by the appellant was calculated only at 45% of the tax which was undercharged instead of at 100% of the amount of tax which had been undercharged. Thus, the penalty imposed at the rate of 45% was reasonable and fair and in accordance with the law based on the audit finding of the case. Thus, the appellant was correct in imposing a penalty under s. 113(2) of the ITA. (paras 74-77)

Case(s) referred to:

- ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 3 CLJ 936 CA (*refd*)
- D *Commissioner Of Inland Revenue v. Fraser* [1942] 24 TC 498 (*refd*)
Commissioner Of Inland Revenue v. The Forth Conservancy Board [1931] UKHL 16 TC 103 (*refd*)
Director-General Of Inland Revenue v. Hui Thong Co Sdn Bhd [1981] 2 MLJ 33 (*refd*)
Director-General Of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd [1990] 2 CLJ 160; [1990] 1 CLJ (Rep) 91 SC (*refd*)
- E *E v. Comptroller-General Of Inland Revenue* [1970] 1 LNS 25 FC (*refd*)
I Investment Ltd v. Comptroller-General Of Inland Revenue [1975] 1 LNS 61 FC (*refd*)
Insaf Tegas Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 1 LNS 1457 HC (*refd*)
Kenny Heights Developments Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923 CA (*refd*)
- F *Ketua Pengarah Hasil Dalam Negeri v. Shaklee Products (M) Sdn Bhd* (Civil Appeal No: RS-14-07-2008) (Unreported) (*refd*)
Kota Kinabalu Industries Sdn Bhd v. Director General Of Inland Revenue [1981] 1 LNS 50 FC (*refd*)
KT Co v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur [1992] 1 MSTC 3255 (*refd*)
- G *Leeming v. Jones* [1930] UKHL 15 TC 333 (*refd*)
Lionel Simmons Properties Ltd (In Liquidation) & Ors v. Commissioners Of Inland Revenue [1980] UKHL 53 TC 461 (*refd*)
Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 SC (*refd*)
- H *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25 SC (*refd*)
NYF Realty Sdn Bhd v. Comptroller Of Inland Revenue [1974] 1 LNS 100 HC (*refd*)
- Legislation referred to:**
Income Tax Act 1967, ss. 2, 4(a), 113(2)(b), Schedule 5 para 34
- I *For the appellant - Muazmir Mohd Yusuf; SRC & Nordiana Sham; RC*
For the respondent - Gan Yi Yang & Vilasiny Gannasen; M/s Vilasiny Gan & Co
Reported by Suhainah Wahiduddin

JUDGMENT

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Ahmad Kamal Md Shahid J:**Introduction**

[1] This is an appeal by Ketua Pengarah Hasil Dalam Negeri (the appellant) against the deciding order of the learned Special Commissioners of Income Tax (SCIT) dated 26 August 2020 according to para. 34 of Schedule 5 to the Income Tax Act 1967 (ITA) in respect of the Notice of Additional Assessment for the Year of Assessment (YA) 2013.

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[2] The SCIT had allowed the appeal by way of Form Q by the respondent against the assessment raised by the appellant.

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[3] The appellant, partially dissatisfied with the aforesaid deciding order, filed a notice of appeal dated 14 September 2020 requesting the SCIT to give their grounds of judgment for the opinion of the High Court and this appeal is now before this court for the court's opinion whether based on the facts stated by the SCIT, the SCIT's decision was correct in law.

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[4] After the hearing, I allowed the appellant's appeal in encl. 1. The grounds for my decision appear below.

Background Facts

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[5] The background facts of this appeal based on the cause papers and submissions of the parties are largely undisputed and can be summarised as follows:

- (i) The respondent was incorporated under the Companies Act 1965 on 29 May 1996.
- (ii) The Majlis Mesyuarat Kerajaan Negeri Sembilan had approved the respondent's application to acquire a plot of land *ie*, HS(D) 202186, PT 23994, Mukim Rasah, Seremban, Negeri Sembilan (the land) on 20 August 1997.
- (iii) The respondent acquired the property from the Government of Negeri Sembilan on 8 April 2004 with a purchase price of RM600,000. The respondent intends to keep the property as a fixed asset of the company which it can be seen through the report under the financial statement of Selectcool Sdn Bhd.
- (iv) The respondent never carried out any business under the company "Selectcool Sdn Bhd" from 1996 to 2011 and this can be seen from the report under financial statements of Selectcool Sdn Bhd as follows:

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- A Principal Activity
- The company has not commenced business operation since date of incorporation. There has been no significant change in the nature of this principal activity during the financial year.
- B (v) According to the respondent, the land was acquired with the sole intention of keeping it as a long-term investment. This is evident from the respondent's treatment in the audited accounts to classify the land as its fixed assets since the date of acquisition and this treatment had been consistently adopted throughout the period of its ownership of the land. The gain from subsequent disposal of the land was captured as "Gain from disposal of fixed assets" and not of the respondent's revenue.
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- (vi) In 2011, Nada Network Sdn Bhd (Nada Network) offered to the respondent to purchase part of the land with the condition that the respondent will subdivide the property. Both parties have entered into a sale and purchase agreement dated 21 March 2011 and Nada Network had agreed to the purchase price as set by the respondent, which is RM2,003,080.
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- (vii) In furtherance to the above, Nada Network has clearly stated its intention to ask the respondent to subdivide the property to develop a service centre/petrol pump station. In relation to that, the respondent has made an application for planning permission to the Seremban Municipal Council and the application was approved by the authorities through a letter dated 5 January 2012.
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- F (viii) The respondent's company was again approached with another offer by Condolink Sdn Bhd (Condolink) to purchase the remaining portion of the land. The respondent has set a sale price at RM5,000,000 and both parties have signed a sale and purchase agreement on 23 October 2012. In this sale and purchase transaction, Condolink was only able to pay the respondent in cash of RM2,600,000 and the remaining purchase amount of RM2,400,000 was settled in kind of eight units of shophouses in Pekan Lukut, District Port Dickson.
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- (ix) Upon completion of the sale and purchase transactions as stated above, the respondent has filed CKHT Forms 1A, 1B and 3 to the Jabatan Perolehan dan Aset (Seremban Branch) of the appellant through the respondent's solicitor in December 2012. Following that, the respondent also instructed the audit firm of Messrs Francis Chia & Co to prepare the financial statement report for the year 2013.
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- (x) On 31 October 2016, the appellant had raised the additional assessment for the YA 2013 in relation to the disposal of the land amounting to RM2,162,576.11.
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- (xi) The respondent thereafter filed their appeal against the notice of additional assessment by way of Form Q dated 25 November 2016. A
- (xii) The SCIT in its deciding order dated 26 August 2020 partially allowed the appeal by the respondent. The deciding order reads as follows:
- RAYUAN INI TELAH ditetapkan untuk keputusan pada hari ini dalam kehadiran Encik Alex Gan Yi Yang bersama Cik Vilasiny a/p Gannasen, Peguam Bela dan Peguam Cara bagi pihak Perayu dan Cik Anis Afiqah binti Che Rahim, Peguam Hasil, Lembaga Hasil Dalam Negeri bagi pihak Responden; B
- ADALAH DIPUTUSKAN bahawa Perayu telah berjaya membuktikan sebahagian rayuan Perayu selaras dengan perenggan 13 Jadual 5 Akta Cukai Pendapatan 1967 [Akta 53] (ACP 1967); C
- DAN bahawa keuntungan yang diperolehi daripada pelupusan hartanah HS(D) 202186, PT 23994, Mukim Rasah, Seremban, Negeri Sembilan (Hartanah tersebut) adalah tidak tertakhluk kepada Seksyen 4(a) ACP 1967 [Akta 53]; D
- DAN bahawa Perayu gagal membuktikan perbelanjaan komisyen kepada Shazni bin Sulaiman telah dibuat untuk pelupusan Hartanah tersebut dan oleh itu bukanlah suatu perbelanjaan di bawah seksyen 33(1) ACP 1967; E
- DAN DENGAN ITU rayuan Perayu dibenarkan sebahagian dan Notis Taksiran Tambahan (Borang JA) bagi tahun taksiran 2013 yang berkaitan dengan rayuan ini dan juga penalti adalah ketepikan.
- (Refer to pp. 12 and 13 of the Rekod Rayuan (Bahagian A)). F

The Issues

[6] The main issues in this appeal are as follows:

- (i) Whether the gains/profits arising from the disposal of the land are taxable under s. 4(a) of the ITA; and G
- (ii) Whether the SCIT was right in law and in fact to set aside the penalty under s. 113(2) of the ITA imposed by the appellant onto the respondent?

Contention Of Parties H

[7] The appellant's pleaded case is essentially based on their own and their expert calculations to evaluate the additional assessment and penalty under the ITA against the gain from the disposal of the land totalling RM6,065,884.

[8] The appellant claimed the so-called additional assessment amounting to RM6,065,884 with a penalty at the rate of 45% was analysed by ascertaining whether the transaction between the respondent and Nada I

- A Network through the sale and purchase agreement dated 21 March 2011 and the respondent and Condolink through the sale and purchase agreement dated 23 October 2012 would be in any way constitute gains or profits from a business which can be assessable under s. 4(a) of the ITA.
- B [9] The appellant claimed that the gains received by the respondent from the disposal of the land were correctly assessed under s. 4(a) of the ITA as a business income of the respondent as the evidence adduced had clearly shown that the respondent's action tantamount to an adventure in the nature of trade.
- C [10] The respondent's pleaded defence was that the respondent is incorporated on 29 May 1996 and has since remained dormant until to date. The land is the only property the respondent acquired during the period of incorporation until to date and the respondent had not engaged in any other property transaction during this period.
- D [11] The respondent has entered into two separate sale and purchase agreements to dispose of the said land as follows:
- E (i) Nada Network dated 21 March 2011 for a consideration of RM1,873,080 and Nada Network paid an additional consideration of RM130,000 because the final land size sold to Nada Network was bigger than obtained and this was recorded in writing through a letter dated 2 February 2013. Therefore, the total sale consideration to Nada Network is RM2,003,080.
- F (ii) Condolink dated 23 October 2012 for a consideration of RM5 million whereas RM2.6 million was settled in cash and balance RM2.4 million was settled in-kind *ie*, eight units of shop houses in Pekan Lukut, Port Dickson of an equivalent value.
- G [12] The respondent had duly reported the disposal of the land to the appellant by submitting the Forms CKHT 1A pursuant to the Real Property Gains Tax Act 1976 (the RPGT Act).
- H [13] The respondent had proved that at all the material time, the land had been classified as a fixed asset and it resembled in the respondent's statement of account and cannot be classified as a stock for trading purposes as contended by the appellant.
- H **The Law**
- [14] It is trite law that a decision of SCIT can be set aside if the decision is tainted with the error or misconception of law or the decision is not supported by the evidence before the SCIT.
- I [15] This principle of law has been succinctly explained in the case of *Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541; [1994] 1 MLRA 262; [1994] 2 AMR 1735; [1994] 2 MLJ 713, in the following manner:

First of all, it would be pertinent to say that in consideration of this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v. Bairstow and Harrison*, regarding *the duty of the court when hearing appeals from commissioners in tax cases*. It will be recalled that in that case what Lord Radcliffe said (at pp. 35-36) was this:

I think that the true position of the court on all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination, I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. *When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous on point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.* It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as those many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur'.

In *Chua Lip Kong v. Director-General of Inland Revenue*, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:

... It is *plainly wrong in law*; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principles laid down by Viscount Radcliffe in *Edwards v. Bairstow*. It is a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside.

A And, in *Lim Foo Yong Sdn Bhd v. Comptroller-General of Inland Revenue*, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners. Here is what his Lordship said (at p. 169):

B The special commissioners are, of course, as the Federal court rightly observed, the judges of fact, but in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they *must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were*

C *of no probative value in supporting their conclusions.*

(emphasis added)

[16] Further guidance can be gleaned from the decision of the Federal Court in *I Investment Ltd v. Comptroller General Of Inland Revenue* [1975] 1 LNS 61; [1975] 1 MLRA 669; [1975] 2 MLJ 208 where Raja Azlan Shah FCJ (as the late Royal Highness then was) held:

E It has been said more than once that when we come to deal with income tax cases, **we must look at all the surrounding circumstances**, not for the purpose of considering what one's own conclusion might be, but for the purpose of seeing, in fact, whether there is evidence both ways – whether there is evidence upon which the Special Commissioners could arrive at their conclusion ...

(emphasis added)

F [17] Further the then Supreme Court in the case of *Director-General Of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 CLJ 160; [1990] 1 CLJ (Rep) 91; [1990] 1 MLRA 373; [1990] 2 MLJ 415 at 419 held as follows:

G *It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967 (paras. 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and then to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore, conclusive.* In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in *Griffiths v. JP Harrison (Watford) Ltd* at p. 916.

H Now the powers of the High Court on an appeal are very limited. *The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous in point of law'.* Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. *It is not sufficient*

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that the judge would himself have come to different conclusion. Reasonable people on the same facts may reasonably come to different conclusions; and often do. Juries do. So, do judges. And are they not all reasonable men? But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere.

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*A court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see *Edwards v. Bairstow*, *Director-General of Inland Revenue v. LCW* at p 251 and *Kota Kinabalu Industries Sdn Bhd v. Director-General of Inland Revenue* at p 190).*

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(emphasis added)

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[18] The court also has to be remindful of the caution made by the Court of Appeal in *Kenny Heights Developments Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923; [2015] 4 MLRA 114; [2015] 4 MLJ 487; [2015] 3 AMR 205 where it had stated as follows:

[24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as SCIT. *The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance. It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.*

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[25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. *Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT.* (see *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541; [1994] 2 MLJ 713; [1994] 2 AMR 1735; [1994] 1 MLRA 262).

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(emphasis added)

The Decision Of The Court

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Whether The Gains/Profits Arising From The Disposal Of The Land Are Taxable Under s. 4(a) Of The ITA

[19] The main issue here is whether the gains or profits which the respondent received from the disposal of the land is a business income taxable under s. 4(a) of the ITA.

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A [20] Sub-section 4(a) of ITA provides:

4. Classes of income on which tax is chargeable

Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:

B (a) gains or profits from a business, for whatever period or time carried on;

...

[21] The word “business” has been defined under s. 2 of the same Act as follows:

C business includes profession, vocation and trade and every manufacture, **adventure or concern in the nature of trade**, but excludes employment.
(emphasis added)

D [22] Clearly, this definition of “business” is not exhaustive as the word “includes” is used in the definition. In any event, business under the definition includes *inter alia* adventure in the nature of trade.

E [23] Obviously, the next question here is what constitutes an adventure in the nature of trade. In this regard, reference to the case of *Leeming v. Jones* [1930] UKHL 15 TC 333 quoted in the case of *Director-General Of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd (supra)* is of assistance which states *inter alia*:

... the following four conditions approved in *Leeming v. Jones*, one of which must be present to establish the existence of an adventure in the nature of trade:

- F (i) the existence of an organisation;
- (ii) activities which lead to the maturing of the asset to be sold;
- (iii) the existence of special skill, opportunities in connection with the article dealt with;
- G (iv) the fact that the nature of the asset itself should lend itself to commercial transactions.

H [24] An isolated transaction can also be considered an adventure in the nature of trade based on the facts and circumstances of a particular case. This has been explained by Hashim Yeop Sani J (as he then was) in the case of *Director-General Of Inland Revenue v. Hui Thong Co Sdn Bhd* [1980] 1 MLRH 631; [1981] 2 MLJ 33, which said this:

I Authorities have shown that the term ‘trading’ covers a wide diversity of activities and that an isolated transaction without any continuity cannot be said to be trading but may however under *certain circumstances be construed as an adventure or concern in the nature of trade. But whether an isolated transaction in fact amounts to an adventure or concern in the nature of trade would depend very much on the facts and circumstances of each case.*

In *California Copper Syndicate (Limited and Reduced) v. Harris* Lord Justice Clerk at page 165 said:

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. *But it is equally well established that enhance values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investment as a business, and thereby seeking to make profits.* There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax. What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being – *Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?*

In *Leeming v. Jones Rowlatt J* had to deal with the problem of what is the dividing line between the case of a man buying and selling in an isolated transaction and buying and selling in a transaction but which can be said to yield a taxable income. The proper test is found in his judgment at page 340:

I venture to refer, with respect, to what the Lord President, Lord Clyde, said in the case of *The Commissioners of Inland Revenue v. Livingston*. He is dealing with this very point and he says this; *'I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, in the nature of trade', is whether the operations involved in its are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made.*

Lord Russell in *Commissioners of Inland Revenue v. Reinhold*, however held that before a transaction can properly be regarded as an adventure in the nature of trade' regard must be had to the 'character' and 'circumstances' of that particular transaction. Further down page 394 he said:

The Lord Advocate contended that if a person buys anything with a view to sale, that is a transaction in the nature of trade; that the purpose of the acquisition in the mind of the purchaser is all-important and conclusive; and that the nature of the thing purchased and the other surrounding circumstances do not and cannot operate so as to render the transaction other than an

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- A adventure in the nature of trade. In my opinion that argument so formulated, is too absolute and is not supported by the judicial pronouncements on which it was sought to be based. It takes no account of a variety of circumstances on which are or may be relevant to the determination of such a question.
- B Another important principle can be found in the speech of the Lord President (Clyde) in *Rutledge v. The Commissioners of Inland Revenue* at page 496:
- It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade.
- C But, on the question whether someone entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser's object or intention are material. Again it was asserted that 'it is no doubt true that the question *whether a particular adventure is 'in nature of trade' or not must depend on its character and circumstances.* (emphasis added)
- D **[25]** The learned judge in the case of the *Commissioner Of Inland Revenue v. The Forth Conservancy Board* [1931] UKHL 16 TC 103 at 116 defined trade as follows:
- ... For trade involves something in the nature of a commercial undertaking, of which the buying and selling are most obvious characteristics.
- E **[26]** Further in the case of *NYF Realty Sdn Bhd v. Comptroller Of Inland Revenue* [1974] 1 LNS 100; [1974] 1 MLRH 39; [1974] 1 MLJ 182 at 183, Sharma J had laid down guidelines for the court to determine the "badges" of trade as follows:
- F The following criteria for distinguishing between taxable and non-taxable selling profits are useful in determining the question:
- (1) Subject matter of the transaction
- Property which does not yield income or personal enjoyment to its owner merely by virtue of its ownership, and which is normally the subject of trading and rarely the subject of investments, is more likely to have been acquired for the purpose of resale at a profit than property which does yield such income or enjoyment;
- G
- (2) Period of ownership
- H The fact that property is held for but a short time after its acquisition may tend to indicate that the purpose of acquisition was resale at a profit;
- (3) Frequency of transactions
- I If there had been a number of transactions in the same kind of property it may be presumed that the taxpayer's purpose in purchasing the particular property was its resale at a profit;

(4) Alteration of property to render it more saleable

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The fact that material alterations or improvements have been made to property or that its character or quality has been changed so as to render it more merchantable would tend to indicate that the property was derived from a profit-making undertaking or scheme. However, if the property was clearly acquired for other purposes, extensive activities to render it more saleable after it is no longer useful for such original purposes would not cause any selling profit to be taxable;

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(5) Methods of employed in disposing of property

If special exertion is made to find or attract purchasers such as the opening of an office or advertising extensively, such facts tend to indicate the presence of a profit-making undertaking. However, such facts would not of themselves cause the profit to be taxable if the original purpose in acquiring the property was to use it rather than to resell it at a profit;

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(6) Circumstances responsible for sale

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If sale of property is occasioned by sudden emergency or unanticipated need for funds, such facts will tend to indicate that the property was not acquired for the purpose of resale at a profit and that the sale was not pursuant to a profit-making undertaking or scheme.

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[27] Having laid down the principles of law about this issue, I now move to the facts proved in this case.

[28] Based on the above, I am of the view that in order to address the issue, this court must look at the facts of this case as a whole and in totality.

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[29] Having perused the facts and evidence produced before the SCIT, I am of the view that the gain received by the respondent from the disposal of the land was made with the intention to trade.

[30] I find that the evidence produced before the SCIT, clearly shows that the transaction by the respondent is evidence in the nature of trade based on the following criteria:

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(i) the subject matter of the transaction is a plot of land;

(ii) the respondent has the intention to gain profit from the disposal of the land;

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(iii) alteration has been made to the land before its disposal to make it more saleable such as the division of the lot from the land and application for planning permission;

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- A (iv) frequency of disposal made by the respondent. The respondent has made two disposals from the two divisions of the land;
- (v) the location of the land; and
- (vi) the respondent's financial position.
- B **The Subject Matter Of The Transaction**
- [31] I find that the SCIT has failed to consider the facts that the land does not yield an income to the respondent since the acquisition of the land in 1997 until its disposal to Nada Network and Condolink in 2011 and 2012 respectively.
- C [32] The case of *NYF Realty Sdn Bhd (supra)* clearly states that a property that does not yield income or personal enjoyment to its owner by virtue of its ownership, and that which is normally the subject of investments, is more likely to have been acquired for the purpose of resale at profit than property which does yield such income or enjoyment.
- D [33] The SCIT has also failed to take into account the facts adduced from the reports and financial statements of the respondent dated 16 December 2013 whereby the respondent did not report any income for the year ended 30 June 2013 and the fact that the respondent is a dormant company.
- E [34] I view the fact that the respondent did not truly intend to yield income from the above investments shows that the respondent was trading when disposing of the said land.
- F [35] Reference is made to the case of *Commissioner Of Inland Revenue v. Fraser* [1942] 24 TC 498, where the taxpayer who carried on the trade of woodcutter, made a profit from an isolated whisky deal. The respondent in *Fraser's* case never had any dealing in whisky before the transactions, and he had no special knowledge of the whisky deal. The court held that the profit was derived from an adventure in the nature of trade and thus taxable.
- G [36] The SCIT in its grounds of judgment had erred in its findings when the SCIT had on pp. 9 and 10 Rekod Rayuan Tambahan stated that:
- (a) **Hartanah tersebut tidak menjana pendapatan selama 8 tahun**
- Hal ini saya dapati adalah petunjuk jelas bahawa Perayu berniat untuk memegang tanah tersebut sebagai pelaburan. Di dalam MAA perayu, terdapat salah satu tujuan iaitu pelaburan.
- H [37] It seems that the SCIT appear to have placed undue reliance on the Memorandum and Articles of Association (MAA) of the respondent and accepted the contention of the respondent that because purchasing lands for investment was one of the objects listed in the MAA, this was in law conclusive that in retaining the said land prior to the sale, it was carrying on a business.
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[38] However, the SCIT failed to consider that the objects as stated in the MAA of the respondent are not conclusive. A

[39] The Court of Appeal in the case of *ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 3 CLJ 936; [2005] 1 MLRA 714; [2005] 5 MLJ 717 held:

The objects as stated in the Memorandum and Articles of Association of a company by themselves are not conclusive. This has been stated again and again by the court in various authorities. The objects of the company as stated in the Memorandum and Articles of Association of the company permit the carrying out of the objects stated therein but the company is not obliged to carry out those objects and it is virtually not possible for the company to carry out all the objects as stated in its Memorandum and Articles of Association. B C

It is not safe for the Special Commissioners to come to the conclusion that the appellant's principal activity is dealing in property merely on the ground that it is one of the stated objects of the appellant as found in its Memorandum and Articles of Association. To come to a safe conclusion one has to go into the activities of the appellant whether in the past or in the present to find out whether the activities are one of the stated objects of the appellant. D

(emphasis added)

Intention Of Taxpayer

[40] The respondent contends that the real purpose or intention of the respondent when acquiring the land is for a long-term investment purposes. This is evident from the respondent's treatment in the audited accounts to classify the land as its fixed assets since the date of acquisition and this treatment had been consistently adopted throughout the period of its ownership of the land. E F

[41] I view that the statement and argument made by the respondent were not conclusive because the intention may be changed and these findings alone must be connected and collaborated with other evidence such as the action and motive of the appellant during that period.

[42] In the case of *Lionel Simmons Properties Ltd (In Liquidation) & Ors v. Commissioners Of Inland Revenue* [1980] UKHL 53 TC 461 at 491 Lord Wilberforce held: G

... Intention may be changed. What was first an investment may be put into the trading stock – and, I suppose, *vice versa* ... H

[43] From the above, it is clear that even though the initial intention of the respondent was for investment purposes, the said intention can be changed at any time.

[44] From the facts of this case, I am of the view that the intention of the respondent was not for investment but an adventure in the nature of trade as there was clear evidence showing a motive to seek profit rather than for investment. I

- A [45] This can be seen from the evidence adduced in relation to the position of the respondent's company with only a capital of RM2 and its dormant status, both of which are a combination that shows that the respondent is merely a shell of a company, which existed for the purpose to keep and dispose off the land in order to gain profit. (See p. 387 of the Rekod Rayuan, Bahagian D, Jilid 3) (See pp. 27 to 28 of the Rekod Rayuan, Bahagian C, Jilid 11-1)
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- C [46] Further, I find that from the evidence produced during the trial that even from the year of acquisition of the land in 1997, the land has been categorised for "building" purposes. It means that the land has a high commercial value even though there was nothing done to the land.

- [47] It was decided in *E v. Comptroller-General Of Inland Revenue* [1970] 1 LNS 25; [1970] 1 MLRA 92; [1970] 2 MLJ 117 that one isolated transaction was enough to constitute trading when it held that:

- D ... whilst a trade usually consists of a series of transactions implying some continuity and repetition of acts of buying and selling, in view of the definition of 'trade' ... the mere facts that **there is only one transaction does not preclude the possibility that the transaction is in the nature of trade.** Thus, on single purchase and sale or one purchase and many sales have been held in the English and Scottish courts to be trading ...
- E (emphasis added)

(See also *Director General of Inland Revenue v. Hui Thong Co Sdn Bhd (supra)*).

- [48] Therefore, I view that the SCIT had erred in its findings when the SCIT stated on p. 10 of the Rekod Rayuan Tambahan that:

- F (b) **Perayu mempunyai niat untuk mencari keuntungan semasa memperolehi Hartanah tersebut.**

- G **Saya mendapati Perayu telah klasifikasikan tanah tersebut sebagai asset dan bukan stok dagangan, ini jelas menunjukkan bahawa niat Perayu adalah untuk pelaburan jangka masa Panjang.** Seksyen 2 ACP mentafsirkan stok dagangan sebagai harta benda yang dijual dalam urusan biasa perniagaan. Oleh itu, Hartanah tersebut bukanlah stok dagangan kerana Perayu sebelum ini tiada menjalankan apa-apa aktiviti perniagaan yang melibatkan Hartanah tersebut dan selepas ianya dilupuskan, tidaklah boleh dianggap sebagai pendapatan daripada dagangan. (emphasis added)

- H [49] Although the respondent had classified the said land as an asset and not as the stock in trade but based on the nature and character of the whole scheme of acquisition of the land, I am of the view that the appellant was right in their tax treatment of the respondent.

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[50] I view that regardless of the label used in categorising the land in the respondent's account, whether it is asset or stock in trade, the true nature and character of the whole scheme of acquisition of the land should be taken into consideration. I find support in my view by referring to the case of *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25; [1994] 1 MLJ 405; [1993] 1 MLRA 754; [1994] 1 AMR 103 where the then Supreme Court held as follows:

In our view, *the correct approach would be to look at the substance, not just the label which had been attached to that letter. The law will always look beyond the terminology of the document to the actual facts of the situation* and it is no longer a question of words but substance (See *Woo Yew Chee v. Yong Yong Hoo* 1; *Addiscombe Garden Estates Ltd v. Crabbe* 2). (emphasis added)

Alteration To The Land To Render It More Saleable

[51] On this issue, I am of the considered opinion that the SCIT had failed to take into account the fact that material alterations or improvements have been made to land acquired or that its character or quality has been changed to render it more merchantable would tend to indicate that the land was derived from a profit-making undertaking or scheme.

[52] I find that the respondent's action in hiring Metropolis Planning Sdn Bhd, Bellatron Sdn Bhd and AZ Engineering Consultant to do the alterations on the land is evidence of the respondent's intention to gain profit from the disposal of the land.

[53] Further, I also find that part of the land was also sold to Condolink, a developer company. Based on the agreement entered in 2012 between the respondent and Condolink, there is no precondition for the respondent to get 'Kebenaran Merancang' before the disposal, the fact of which had been agreed upon by the respondent's witness during cross-examination.

[54] The respondent had argued that the alteration works were done to fulfil the terms of the agreement entered in 2011, however the respondent did not refute the facts that the effects of the alteration done is that it will increase the commercial value of the land. (See *Kota Kinabalu Industries Sdn Bhd v. Director General Of Inland Revenue* [1981] 1 LNS 50; [1981] 1 MLRA 494; [1981] 2 MLJ 186).

Frequency Of Transaction

[55] As I have stated in para. 47 above, one isolated transaction was enough to constitute trading. (See *E v. Comptroller Of Inland Revenue (supra)*).

[56] The SCIT has erred in its finding as it has failed to consider that there are two disposals from the same subject matter done by the respondent via two agreements with two different purchasers *ie*, Nada Network and Condolink. I am of the view that these two disposals are the transactions made for the purpose of trading to gain profits.

A Location Of The Land

[57] It is not disputed that the land is located near the Seremban-Port Dickson Highway. According to the Laporan Tahunan Lembaga Lebuhraya Malaysia for the year 2011, the said highway has been opened to the public on September 1987. Therefore, I view that the land has a high commercial value since its acquisition in 1997.

[58] The report also showed that there was an increase in the local population, vehicle registrations, industrial developments and tourism activities in its surroundings. These increments in social activities will definitely influence the market price of the surrounding lands.

[59] The SCIT in its finding on p. 12 of the Rekod Rayuan Tambahan states that:

(e) Lokasi Hartanah tersebut di Kawasan berpotensi

... Hujah bahawa pembinaan lebuhraya meningkatkan nilai Hartanah tersebut tidak disokong dengan mana-mana laporan nilaian hartanah.

[60] Based on the above, I find that the SCIT has failed to take into consideration that the construction and the opening of the highway had in many ways affect the price of the surrounding lands. This has resulted in the price and/or the value increase of the surrounding lands including the subject matter in this appeal. Therefore, there is no necessity for the applicant to produce the valuation report as mentioned by the SCIT.

The Financial Position Of The Respondent

[61] The SCIT has also failed to consider the financial position of the respondent at the time of the acquisition of the land which clearly shows that the respondent is a company with a mere capital of RM2 and bears a dormant status and no income was generated since its incorporation.

[62] Based on the financial position of the respondent, I am of the view that at the time of the acquisition of the land, the respondent has the intention to trade and to gain profit from the disposal of the land at the appropriate time.

[63] The respondent did not conduct any business activities knowing well that the price of the land will increase in time due to its location, position and category for the usage of the land.

[64] Added to that, I am also of the considered opinion that the respondent's action in borrowing money from the director and/or shareholders (free from interest and the money can be returned when the respondent has sufficient funds to operate) for the purpose of acquisition of the land from the State Government of Negeri Sembilan supported the fact and argument that the motive and intention of the respondent when acquiring the land was to resell it at a profit.

[65] Looking at the totality of the evidence before the SCIT, I view that the SCIT had made a conclusion inconsistent with the primary facts and had failed to take into consideration all surrounding circumstances in arriving at its conclusion and opinion. A

Whether The SCIT Was Right In Law And In Facts To Set Aside The Penalty Under Section 113(2) Of The ITA Imposed By The Appellant Onto The Respondent? B

[66] I find that the appellant has correctly imposed penalties on the respondent under s. 113(2) of the ITA and in accordance with the law.

[67] I view that the respondent has made an incorrect return that resulted in less chargeable tax and thereby the appellant was correct in imposing a penalty under s. 113(2)(b) of the ITA. C

[68] It is not disputed that the appellant has discretionary power to impose a penalty against the taxpayer under sub-s. 113(2) of the ITA which reads as follows: D

Incorrect returns

(1) Any person who:

(a) Makes an incorrect return by omitting or understanding any income of which he is required by this Act to make a return on behalf of himself or another person; or E

(b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax or chargeability to tax the of any other person,

shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct. F G

(2) Where a person,

(a) Makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or H

(b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

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- A then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, *the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information has been accepted as correct*; and, if that person pays that
- B penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1). (emphasis added)
- C [69] Based on the above, it is clear that it is the discretion of the Director General of the appellant to impose penalties under sub-s. 113(2) of the ITA after taking into consideration all relevant facts and circumstances of the case.
- D [70] The appellant's witness had clearly given evidence as to why the penalty was imposed and the said evidence was never challenged by the respondent.
- E [71] In the case of *Insaf Tegas Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 1 LNS 1457; MTKL Civil Appeal No: RI-14-14-10-2013; Mahkamah Rayuan Sivil No: W-01(A)-295-08-2016, the Court of Appeal had affirmed the decision of the High Court on the respondent's discretion to impose the penalty when the Court of Appeal held as follows:
- F On the issue as to *whether the Respondent have correctly exercised its discretion in the Respondent's imposition of penalty on the Appellant, pursuant to section 113(2) of the Act, it is clear from the stated provision that the Director General is given the discretionary power to impose a penalty on an incorrect return filed by a taxpayer. The Director General has a right to impose the penalty irrespective that the taxpayer's return was made negligently, or in good faith or with intent to deceive or evade tax. The Director General however, is not duty bound to require penalty payment but, to exercise the discretion after due consideration of all relevant facts and circumstances.* (emphasis added)
- G [72] Further in *KT Co v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur* [1992] 1 MSTC 3255 at 3258, Richard Talalla J (as he then was) held:
- H As I see it subsec. 1 of sec. 113 is couched in mandatory terms but conditioned whereas subsec. 2 is expressed in terms which are discretionary. The Director General may require payment of the penalty. He is not bound to require such payment. *He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances. It seems to me that the Director General would have to consider whether the incorrect return or incorrect information was respectively made or given dishonestly with intention to evade payment of tax or possibly even*
- I *negligently* and then, and only then, mete out the punishment which under

subsec. 2 is a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information and so on. But that is not all. (emphasis added)

[73] Further in the case of *Ketua Pengarah Hasil Dalam Negeri v. Shaklee Products (M) Sdn Bhd* MTKL Rayuan Sivil No: RS-14-07-2008, Aziah Ali J (as she then was) held as follows:

On the penalty imposed under s. 113(2) of the Act, it is submitted that the Respondent had made incorrect returns by understating its income and had declared in its tax returns that it has no tax payable. Therefore, under the law the Appellant was empowered to impose a penalty to a maximum of equal of the amount of tax undercharged. In this case the Appellant imposed only the amount of 60% penalty. (emphasis added)

[74] Hence, based on the authorities for the issue of penalty above, I am of the view that had it not been for the findings from the audit exercise conducted by the appellant, the appellant will not be made known and aware that the tax return made by the respondent is undercharged resulting to less tax imposed on the respondent.

[75] The appellant has a right to impose a penalty under s. 113(2) of the ITA, which is equal to the amount of tax that has been undercharged. However, in this case, after taking into account the merits of the case, the penalty imposed by the appellant is calculated only at 45% of the tax which is undercharged instead of at 100% of the amount of tax which has been undercharged.

[76] Therefore, I am of the opinion that the penalty imposed at the rate of 45% is reasonable and fair and in accordance with the law based on the audit finding of the case.

[77] Based on the above and having perused the grounds of judgment of the SCIT on pp. 16 to 17 Rekod Rayuan Tambahan, I am of the view that the appellant is correct in imposing a penalty under s. 113(2) of the ITA.

Conclusion

[78] Based on the aforesaid reasons, it is my view that the SCIT had failed to scrutinise the evidence presented before it and had misapplied the law and facts that merit the interference by this court.

[79] In the circumstances, I hereby allow the appeal of the appellant with a cost of RM3,000 subject to the allocator fee.

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